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ALEXANDER L. STEVAS,
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No. 82-347

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

IN THE MATTER OF LEGISLATIVE
DISTRICTING OF THE STATE

C. LAWRENCE WISER,

Appellant

v.

HARRY R. HUGHES,

Appellee

ON APPEAL FROM THE COURT
OF APPEALS OF MARYLAND

# JURISDICTIONAL STATEMENT

C. Lawrence Wiser
10605 Concord Street
Suite 400
Kensington, Md 20895
(301)949-7870

Appellant

## QUESTION PRESENTED

1. Whether gerrymandering of districts drawn for election of members of a state legislature is a denial of equal protection under the Fourteenth Amendment to the United States Constitution to those against whom the gerrymandering is directed.

## PARTIES TO THE PROCEEDING BELOW

The Parties to the proceeding below are as follows:

Petitioner: C. Lawrence Wiser, a registered voter in Montgomery County, Maryland.

Amicus Curiae: Bruce A. Goldensohn, Mayor of the City of Gaithersburg, Maryland.

Amicus Curiae: Mayor and Council of Rockville, Maryland.

Respondent: Harry R. Hughes, Governor of Maryland.

Respondent-Intervenors: Senators Victor L. Crawford, Howard A. Denis, Sidney Kramer, Lawrence Levitan, Margaret C. Schweinhaut, S. Frank Shore and Delegates Stewart Bainum, Jr., Mary Boergers, Joel Chasnoff, Jennie M. Forehand, Idamae Garrott, Marilyn Goldwater, Sheila Ellis Hixson, Jerry H. Hyatt, Nancy K. Kopp, Helen Koss, Lucille Maurer, Constance A. Morella, Joseph E. Owens, Donald B. Robertson, Ida G. Ruben, Patricia R. Sher, and Judith C. Toth, Members of the Montgomery County Legislative Delegation (being all of the members of such Delegation except two Delegates who did not participate as Intervenors).

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No. _____

IN THE

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IN THE MATTER OF LEGISLATIVE

DISTRICTING OF THE STATE

C. LAWRENCE WISER,

Appellant

vs.

HARRY R. HUGHES,

Appellee

ON APPEAL FROM THE COURT OF APPEALS

OF MARYLAND

# JURISDICTIONAL STATEMENT

Appellant, C. Lawrence Wiser, appeals from the final Per Curiam Order of the

Court of Appeals of Maryland dated June 4, 1982 dismissing Appellant's Petition that the State legislative districts as drawn for Montgomery County, Maryland violate the equal protection provision of the Fourteenth Amendment to the United States Constitution.

## THE OPINIONS BELOW

The Court of Appeals Per Curiam Opinion issued June 4, 1982 is unreported and is reprinted in the Append hereto, A-1 to A-4. The Report of the Special Master appointed by the Court of Appeals is unreported and is reprinted in the Appendix at A-5 to A.48.

## JURISDICTION

The Per Curiam Order of the Court of Appeals of Maryland dismissing

Appellant's Petition was entered on June 4, 1982.

A Notice of Appeal to this Court was duly filed in the Court of Appeals of Maryland on August 30, 1982 (reprinted in the Appendix at A-82). This appeal is being docketed in this Court within 90 days from the entry of the final Order below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (2) on the grounds that the Court of Appeals of Maryland found that House Joint Resolution No. 32 (which is the 1982 Legislative Districting Plan for the State of Maryland) did not violate the United States Constitution. In the alternative, Appellant requests that the Court treat this appeal as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.

## STATUTE INVOLVED

This case involves House Joint Resolution No. 32 (the 1982 Legislative Districting Plan for the State of Maryland) which was passed by the House of Delegates and the Senate of Maryland at their 1982 legislative session. The portion of this Resolution insofar as it relates to Montgomery County, Maryland (which is the portion challenged by Petitioner) is reprinted in the Appendix at A-49 to A-74).

This Joint Resolution draws districts in the State of Maryland for the purpose of electing members of the Maryland Senate and House of Delegates and was prepared as required by the Maryland Constitution after the completion of the 1980 federal census of population.

## CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, United States Constitution ...No State shall...deny to any person within its jurisdiction the equal protection of the laws.

## RAISING THE FEDERAL QUESTION

At the earliest stage of the proceedings, appellant raised the claim in his original Petition filed with the Court of Appeals of Maryland on March 2, 1982 that "The gerrymandering of legislative districts created in the Governor's Plan contravenes the Fourteenth Amendment to the Constitution of the United States, specifically, due process and equal protection of the laws."

Appellant raised the claim again in a Supplemental Memorandum of Petitioner filed with the Court of Appeals on April 14, 1982

and again in his Memorandum of Petitioner in Opposition to Report of the Special Master filed with the Court of Appeals on May 26, 1982.

## STATEMENT OF THE CASE

In accordance with the provisions of Article III, Section 5 of the Constitution of Maryland, on January 13, 1982 the Governor of Maryland submitted a legislative districting plan for the State to the Maryland General Assembly. It was introduced in the General Assembly on that day as House Joint Resolution 15 and Senate Joint Resolution 10.

On February 2, 1962, Delegate Helen Koss, Chairperson of the Constitution and Administrative Law Committee of the House of Delegates, introduced House Joint Resolution No. 32 in the Maryland House of Delegates. It was essentially

the same in content as House Joint Resolution No. 15 and Senate Joint Resolution No. 10 except that it contained certain technical amendments requested by the Governor, none of which related to the legislative districts in Montgomery County. The House of Delegates approved House Joint Resolution No. 32 (the "Legislative Districting Plan") on February 2, 1982 and the Senate approved it on February 26, 1982. Accordingly, under the provisions of Article III, Section 5 of the Constitution of Maryland, House Joint Resolution No. 32 became the legislative districting plan for Maryland.

The Legislative Districting Plan, insofar as it relates to Montgomery County, was exactly as proposed to the Governor's Advisory Commission by the members of the General Assembly of Maryland from Montgomery County.

The Legislative Districting Plan, insofar as it relates to Montgomery County, was drawn to protect every incumbent (of both political parties) from election opposition from other incumbents. Each of the six legislative districts drawn within Montgomery County contains one incumbent State Senator and three incumbent members of the House of Delegates. The one legislative district shared with an adjacent County contains one incumbent Senator who lives in the adjacent County that includes two-thirds of the district and one incumbent Delegate in the single member portion of that district in Montgomery County.

Pursuant to the provisions of Article III, Section 5 of the Constitution of Maryland, on March 2, 1982, appellant, as a registered voter and resident of Montgomery County, Maryland, filed in the Court of Appeals of Maryland a Petition to

Review the 1982 Legislative Districting of the State of Maryland insofar as it relates to Montgomery County on the grounds that the Legislative Districting Plan violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and violates the Maryland Constitution.

On March 5, 1982, the Court of Appeals entered an Order, appointing a Special Master to hold hearings and submit a Report to the Court containing his recommendations with respect to action to be taken by the Court on the Petition filed by appellant and other petitions filed by persons from other parts of the State.

The Special Master held hearings on April 14, 1982 and April 28, 1982 and subsequently on May 11, 1982 filed his Report (See Appendix at A-5 to A-48) in which he held that the legislative districts objected to by appellant did not

constitute unconstitutional gerrymandering under the Fourteenth Amendment (See Appendix at A-35 to A-37).

The Court of Appeals then held a hearing on June 1, 1982 at which the parties to the petitions were permitted to present their reasons in support of or in opposition to the Report of the Special Master. On June 4, 1982, the Court entered its Per Curiam Order dismissing Appellant's petition, Appendix A-1 to A-4.

Appellant contended in his briefs to the Special Master and the Court of Appeals that the legislative districts drawn to so protect all the incumbent legislators violate the equal protection clause of the United States Constitution because they were gerrymandered to elect incumbents living primarily in the southern half of the County. The gerrymandering

was done by drawing district boundaries that are bizarre, remote and meandering. Each of the three districts in the northern part of the County have "legs" that drop down into the southern part of the County to pick up incumbents living there.

Appellant contended that by gerrymandering the districts in this way, the portion of Montgomery County's population living in the northern part of the County was denied equal protection. See Map entitled "Governor's Plan" showing legislative districts, introduced as Petitioner's Exhibit #4 in the proceedings below, Appendix at A-75. See also Map entitled "New Districts" showing legislative districts and incumbents' residences introduced as Petitioner's Exhibit #5 in the proceedings below, Appendix at A-76.

Forty-Three percent (43%) of the population in the six legislative districts wholly within Montgomery County live north of the major cross county highway in Montgomery County, but none of the six incumbent Senators lives north of that highway and only five of the eighteen incumbent members of the House of Delegates for those districts live north of that highway (See Memorandum entitled "Population of Montgomery County and Residency of Incumbent Legislators North and South of Randolph Road" introduced as Petitioner's Exhibit #13 in the proceedings below, Appendix at A-77 to A-81). Petitioner lives north of that major cross county highway and is one of the citizens denied equal protection by the Legislative Districting Plan.

## THE FEDERAL QUESTION IS SUBSTANTIAL AND IMPORTANT

Except where racial factors were involved, this Court has never rendered an opinion as to whether gerrymandering in the drawing of districts for the election of public officials is a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The Court's decisions in Baker v. Carr, 369 U.S. 186 (1962) and Reynolds v. Simms, 377 U.S. 533 (1964) and other later cases have largely resolved the problems of legislative reapportionment with respect to disparities of population in drawing legislative districts.

However, throughout the United States the purpose of reapportionment, the redistribution of political representation

and power, is extensively being frustrated by gerrymandering in the drawing of districts for the election of public officials. If incumbents in declining population areas are permitted to gerrymander legislative districts so as to draw districts that permit them to represent not only the declining areas but also all of the growth areas, then the persons living in the areas of population growth are effectively being denied equal protection under the Fourteenth Amendment.

Since the legislatures draw the districts, the only way to protect the constitutional rights of those persons denied equal protection is through Court action.

Surely there can be no more basic right than the right to equal protection in the creation of legislative districts from which will be elected those who make the laws by which the community will be

governed.

Assuring equality of population is not enough to assure fair representation. Gerrymandering is an equally and perhaps even more dangerous threat to fair representation.

This Court has ruled in Gaffney v. Cummings 412 U.S. 735, 751 (1973) that "State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment".

The Court went on to say (citing Fortson v. Dorsey, 379 U.S. 433, 439 (1965))

> A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population'.

In his concurring opinion, City of

Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 1510 (1980) Justice Stevens wrote

> Whatever the proper standard for identifying an unconstitutional gerrymander may be, I have long been persuaded that it must apply equally to all forms of political gerrymandering - not just to racial gerrymandering.

The goal of representative government which was the purpose of the reapportionment decisions by this Court has been effectively frustrated on a broad scale throughout our country by the political manipulation of gerrymandering. One authority has even gone so far as to state that "the gerrymander is a form of political manipulation similar to bribery, vote stuffing, etc." Hardy, Considering the Gerrymander, 4 Pepperdine Law Review 243, 244 (1977).

The gerrymander is the major obstacle to fair and effective

representation. It results in serious distortions in the political process. The goal of fair representation cannot be achieved unless the gerrymander is eliminated. "Gerrymandering can be as invidious as malapportionment of populatio n depriving voters of an equal voice in choosing their government, Edwards, The Gerrymander and "One Man, One Vote", 46 N.Y.U. Law Rev. 879 (1971).

This Court said in Reynolds v. Simms, supra:

> Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters as citizens of a State, stand in the same relation regardless of where they live.

While that decision related to apportionment of legislative members on the basis of equality of population, its reasoning and principle seems equally applicable to gerrymandering which dilutes the effective legislative representation of those who live in one area and benefits those who live in another area. That kind of gerrymandering effectively dilutes the votes of those living in the area against whom the gerrymandering is directed.

Gerrymandering is inherently a discrimination against some class of voter. By its very nature, it is a means of achieving a discriminatory result at the expense of that class of voter. It effectively gives greater weight to the votes of dominant or controlling political elements.

Gerrymandering, on the other hand,

> is universally recognized as being inherently invidious. The drawing of irrational district lines, like the creation of districts of unequal population, can have but one purpose: to discriminate against some class of voters.

Edwards, The Gerrymander and One Man, One Vote, supra.

Gerrymandering, whether or not racial factors are involved, is a discrimination against those toward whom the gerrymandering is directed and denies those persons equal protection.

The power to gerrymander gives those who wield it a tremendous advantage over those who do not and prevents the achievement of fair representation in government. The achievement of this goal can only be achieved by action by the Court since the power to draw new legislative districts in Maryland, as in most states, is in the hands of the legislature. The inherent conflict of

interest which the legislature has in drawing new legislative district boundaries, combined with the use of the gerrymander, undermines representative democracy and public confidence in the political process.

In Gaffney v. Cummings, supra, at 752, this Court (while stating that it was not a denial of equal protection to draw legislative districts that created a statewide districting plan which achieved a rough approximation of the statewide political strengths of the Democratic and Republican Parties) said at 754, "What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment".

The power to gerrymander is an abuse of power by members of the

legislature because of their desire for self-perpetuation in office. The inherent conflict of interest between that desire and the power to draw new legislative districts, together with the heavy advantages of individual incumbency and the natural mutual alliances of incumbents in an election leave the citizen who seeks fair representation, as a practical matter, only with the remedy of seeking redress from this Court to give guidance to Courts throughout our country on this basic issue, the resolution of which is essential to representative government.

The Legislative Districting Plan adopted for Montgomery County frustrates the very basic purpose of reapportionment which is the redistribution of political representation and power between areas of population growth and areas of

declining population. Under the Legislative Districting Plan, areas of growth in Montgomery County do not receive increased representation. Instead, the old representation in which most incumbents lived in and represented the southern portion of the County is preserved by carefully drawn districts of strange shapes so that all incumbents are in districts where they will not be opposed by other incumbents. This has been done even though most incumbents live in the lower part of the County while population growth has been in the upper part of the County.

Given the heavy advantages of incumbency in an election, this means that the newly proposed districts nearly assure that those who are legislators before reapportionment will all still be in office after reapportionment even though drastic changes in population

growth and concentration have occurred. By gerrymandering legislative districts which it drew to its own advantage, the Montgomery Legislative Delegation failed to represent the public interest. In the most blatant display of conflict of interest, the Montgomery Legislative Delegation acted to their own personal advantage and frustrated the whole purpose of reapportionment.

The natural result of reapportionment is that incumbents in areas of relatively declining portions of population must be combined in districts that do not overrepresent those areas at the expense of areas which have gained population. This is a difficult fact for incumbents to accept. But unless it is done, the redistribution of legislative representation which is the very purpose of reapportionment will have been completely frustrated.

Incumbents will not do it because of their self-interest. Therefore, in order to assure that reapportionment works to make our institutions of government representative of the people and to give the people the equal protection implied in reapportionment, this Court must act.

The battle for fair representation is largely being lost by gerrymandering which remains the last major obstacle to fair representation. The citizens against whom gerrymandering is directed are left with no practical remedy except this Court.

## CONCLUSION

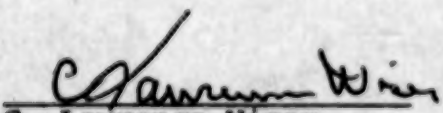
Appellant suggests that this Court's statement in its landmark decision for equal population requirements, Reynolds v. Sims, supra,

at 566 is applicable to the Constitutional defects of this legislative districting case:

> We are cautioned about the dangers of entering the political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

For the reasons stated herein, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,



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